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IN THE

Supreme Court of the United States

October Term, 1941

No. 192

JOSHUA F. SIMONS, WILLIAM MARKOWITZ, and SAMUEL MARKOWITZ,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONERS.

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The statement, in the respondent's brief, of the question presented, is not precisely accurate. The question is not:

> "Whether the accused may effectively consent to the completion of a jury trial before a substitute judge, when the first judge becomes incapacitated by illness after all the evidence has been introduced but before the jury has been instructed and final arguments completed" (Resp. Br. p. 2),

but as stated on page 6 of our petition:

> "* * * whether the substitution, pursuant to stipulation and after all the evidence had been taken,

of one judge for another in the course of the trial of a criminal case before a jury, and the instruction of the jury by the substituted judge who had not seen the witnesses nor heard their testimony but had merely read it, deprived petitioners of their constitutional right to trial by jury, or is such a departure from established judicial procedure as to deprive the petitioners of their liberty without due process of law."

Boiled down to its very essence, the question is this: In a trial by jury, is a substituted judge who has not seen any of the witnesses nor heard their testimony, empowered to instruct the jury on the law and to *advise them on the facts?*

This Court has held that a trial by jury is, among other things, one held "in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts * * *".

Patton v. U. S., 281, U. S. 276 at 289; 74 L. Ed. 854 at 858-59;

Capital Traction Co. v. Hof, 174 U. S. 1 at 13-14; 43 L. Ed. 873 at 878.

The necessary corollary of the question here presented is: Is a trial presided over by a judge not empowered to perform all the duties of a trial judge,—that is before a judge not empowered to advise the jury on the facts—a trial before a duly constituted court?

The holding in the *Patton* case that the accused might waive his right to trial by a jury of twelve, was based in the final analysis upon the proposition announced and italicized by this Court in its decision in that case:

> "* * * and a court is fully organized and competent for the transaction of business without the presence of a jury." (281 U. S. 276 at 299; 74 L. Ed. 854 at 864),

and obviously does not decide the contention here presented, which is that petitioners were convicted in a court not fully organized and competent for the transaction of the business of the trial there at bar.

As urged in petitioner's opening brief, at pages 15-16, if the substituted judge was empowered, by virtue of his commission and his designation and assignment, to perform all the duties of a trial judge in the instant case, the stipulation, which respondent stresses, was unnecessary and served no purpose. If the judge was not so empowered, he could not be empowered by stipulation, as courts are constituted and empowered only by law. They cannot be constituted, nor can power to perform functions be conferred on them by stipulation.

No question of the jurisdiction of the District Court of the Western District of Washington is involved. The judge is not the court, but merely an officer of the court. The question is whether a court, presided over by a substituted judge, who has not seen the witnesses nor heard their testimony but has merely read it, is duly constituted and the substituted judge empowered to instruct the jury.

Respondent has misconceived, or ignored, the scope of petitioners' argument. The burden of respondent's argu-

ment (Resp. Br. pp. 5-6) is to the effect that, as the *Patton* case held that a defendant may waive the right to a jury trial, he may waive any element of such trial. Respondent then states (Resp. Br. p. 6):

> "* * * If such rights may be waived, there can be no reason why the substitution of one *qualified* judge for another under the circumstances of this case, should be forbidden." (Italics supplied.)

This begs the entire question by *assuming* that the substituted judge was *qualified.* The word employed in petitioners' brief, (pp. 11, 13, 14, 15, 16, 17) and used by this Court in the *Patton* and the *Capital Traction* cases, *supra,* is "empowered", and we assume that the word "qualified" is used by respondent as a synonym for "empowered".

The question is not one of the relative importance of conceded rights (Resp. Br. p. 6), but is one of power. It does not follow that, because a defendant may waive trial by jury or details of procedure (Resp. Br. p. 6), before a duly constituted court, he may waive the presence of a duly constituted court presided over by a duly empowered judge.

Respondent also states (Resp. Br. p. 8):

> "* * * it is not altogether clear that the right to trial by jury includes the right to have a judge qualified to comment upon the credibility of the witnesses, as petitioners assume."

Petitioners do not *assume* this principle, but base their statement upon the fact that this Court, in the *Patton* and *Capital Traction* cases, *supra,* declared it to be the law.

In support of its contention, respondent cites a number of State cases and one Hawaiian case. Respondent then sums up the holdings of these cases as follows (Resp. Br. p. 9):

> "Again, that the judge's opinion on the facts is not 'a constituent part of the fundamental right' to trial by jury (*Bannister v. Lucas, supra,* p. 230) is apparent from the fact that in the great majority of jurisdictions judges are forbidden from commenting on the evidence."

It may be conceded that judges are so forbidden in the great majority of jurisdictions. But this Court has held that in the jurisdiction in which this cause was tried, the law is to the contrary and that it is the duty of the judge, in the exercise of a sound judicial discretion, to determine whether or not he should do so.

Patton v. U. S., supra;

Capital Traction Co. v. Hof, supra.

We submit that respondent's contention that the *Patton* case overruled *Freeman v. U. S.,* 227 F. 732, is not sound. The question decided in the *Freeman* case was the same as the one in this case, namely, may the jury be instructed by a substituted judge who has not seen the witnesses nor heard their testimony, but has merely read it. The question decided in the *Patton* case was whether a defendant in a criminal case could effectively consent to trial by a jury of less than twelve, before a duly constituted court. The *Freeman* case is not mentioned in the *Patton* case. Some of the dicta in the *Freeman* case is inconsistent with the decision in the *Patton* case, but the *decision* and the principal reasons upon which the decision in

the *Freeman* case was based are in no wise inconsistent with the *decision* or the reasoning in the *Patton* case.

The Second Circuit did not hold in *Cahill v. Mayflower Bus Lines,* 77 F. (2d) 838, as respondent contends (Resp. Br. p. 7), that the *Patton* case overruled the *Freeman* case, nor did that case hold that the *Freeman* case is based solely upon the premise that the accused may not waive the right to trial by jury. In *Cahill v. Mayflower Bus Lines, supra,* the Court stated at page 840:

> "In Freeman v. United States, 227 F. 732, this court held a judge could not be substituted for another during the taking of testimony because a substituted judge would be unable to advise the jury about the value of the testimony and that a defendant was not free to waive a jury trial. It is now authoritatively decided a defendant may waive a jury. Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263.",

and merely held that a substituted judge could rule on a reserved motion for a directed verdict, the determination of which required only the construction of written instruments. The *Patton* case did not hold that one judge could be substituted for another during or after the taking of testimony.

The statement in respondent's brief (p. 9) that:

> "Similarly, petitioners were obviously not prejudiced by the denial of their motion for a new trial based upon the insufficiency of the evidence [R. 168-169, 178] for they do not challenge the holding of the Court below that [R. 1998-1999]: 'The undisputed evidence in the case, *entirely unattacked as to credibility,* conformed to no other hypothesis than guilt.' (Italics supplied)",

is mere *ipsa dixit* and is, in our opinion, fully answered on page 13 of petitioners' opening brief.

Respondent states in footnote 4 on page 9 of its brief:

> "While it is sometimes loosely said that the 'practice of such comment' was an 'inseparable part of jury trial', at common law, *Wigmore on Evidence* (3rd ed.), Sec. 2551; cf. *Quercia v. United States,* 289 U. S. 466, 468, 469, it is clear that at common law it was merely a practice which the judge could follow in his discretion, and not a matter of fundamental right which the accused could demand. Smith v. Carrington, 4 Cranch 62, 71."

Petitioners contend that this Court did not use loose language in the *Quercia* case, *supra,* the *Patton* case, *supra,* or the *Capital Traction* case, *supra.* If, as stated by respondent, commenting on the evidence is a practice which the judge may follow *in his discretion,* it must necessarily follow that there must be a judge "empowered" to exercise this discretion. Petitioners contend, and Judge Yankwich in effect instructed the jury [R. 1869-1870], that he was not so empowered.

For the foregoing reasons, and for the reasons stated in the petition and in petitioners' opening brief, petitioners respectfully contend that a Writ of Certiorari should be granted and the judgments of conviction should be reversed.

Respectfully submitted,

MARK L. HERRON,
Attorney for Petitioners.